UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

OBERTHUR TECHNOLOGIES OF AMERICA CORPORATION

and

Cases: 04-CA-086325 04-CA-087233

04-RC-086261

GRAPHIC COMMUNICATIONS CONFERENCE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 14-M

EMPLOYER'S ANSWERING BRIEF TO ACTING GENERAL COUNSEL'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Oberthur Technologies of America Corporation ("Oberthur"), by its undersigned counsel, hereby files this Answering Brief in response to the Exceptions to the Decision of the Administrative Law Judge filed by Counsel for the Acting General Counsel ("GC").

AS PRESENTLY CONSTITUTED, THE NLRB DOES NOT HAVE THE CONSTITUTIONAL AUTHORITY TO ADJUDICATE THIS APPEAL.

Preliminarily, and as noted in Oberthur's Exceptions, the Supreme Court held in *New Process Steel LP v. NLRB*, 130 S.Ct. 2635 (2010), that the Board cannot legally function without three confirmed members. Moreover, as recently held in *Noel Canning v. NLRB*, ____ F.3d ____, 2013 WL 276024 (D.C. Cir., Jan. 25, 2013), the Presidential Recess Appointments to the Board were unconstitutional, and the Board lacked the required quorum beginning at least as early as January 4, 2012. Since the Board, at present, only has one confirmed member, it lacks the necessary quorum and, as a result, the Board does not have the constitutional authority to consider the instant Appeal and Exceptions at this time. Accordingly, Oberthur requests that the Board refrain from consideration until it has a validly appointed and confirmed quorum.

In the event the NLRB declines to refrain from adjudicating this Appeal until it has a validly appointed and confirmed quorum, Oberthur submits that the Exceptions advanced by the GC are without merit, and in support offers the following:

GC Exception No. 1

A. The GC's First Exception Is Based Entirely on the Erroneous Proposition that the ALJ Did Not Rule for the GC In Finding a Violation of Section 8(a)(1).

In its first Exception, the GC asserts that ALJ erroneously failed to find that Oberthur violated Section 8(a)(1) of the Act by enforcing a new policy prohibiting employees from discussing the Union in work areas. Paradoxically, the GC cites lines three to five of page

twelve of the ALJ's decision as the basis for the GC's Exception. [GC Brief, p. 11] At that point of the ALJ's decision, the ALJ in fact did find that Oberthur had violated Section 8(a)(1):

1. The Respondent violated Section 8(a)(1) of the Act when, in the absence of a preexisting valid no solicitation rule, its supervisors told employees that they could not talk about the Union in work areas or during work time.

[Decision p. 12]

It is Oberthur's position that this conclusion of law by the ALJ was in error, for the reasons set forth in its Exception No. 5; however, the GC's suggestion that the ALJ did not in fact adequately find a violation in response to the applicable unfair labor practice charge is untenable.

The GC attempts to make a distinction between the ALJ's conclusion that Oberthur "told employees that they could not talk about the Union" and its charge alleging that Oberthur unlawfully implemented and enforced a "new policy prohibiting employees from talking about the Union in work areas." [Decision, p. 12; GC Brief, pp. 10-11] Notwithstanding the GC's assertion that "[t]his is not merely a semantic difference," there is no more apt term to describe the basis for the GC's Exception. [GC Brief, p. 11]

The GC suggests that the ALJ should have found a "broader violation" based on its contention that the ALJ should have recognized that the "prohibition against talking about the Union reflected a change in Respondent's policy." [GC Brief, p. 11] It is beyond comprehension, however, that the position urged by the GC was not encompassed by the ALJ's conclusion that Oberthur "told employees that they could not talk about the Union" "in the absence of a preexisting valid no solicitation rule." [Decision, p. 12] The simple fact is that the ALJ has already decided the substantive issue underlying the GC's exception in favor of the GC.

As discussed in Oberthur's Exceptions, however, the GC's finding that Oberthur violated Section 8(a)(1) was erroneous. The factual determination underlying the ALJ's sustaining of the charge was his finding that supervisor Frank Belcher instructed employees "that they could not talk about the Union to other employees except in areas other than the work floor or on non-work time." [Decision, p. 6]. From this factual finding, the ALJ concluded that the restriction was "overly broad and would prohibit employees from talking about the Union at times and places which would not interfere with either their own work or the work of others." [Decision, p. 6]. Such a conclusion is untenable given the ALJ's finding that the restriction was limited to the work floor during work time.

The ALJ's finding of a violation, as well as the GC's present Exception, is contrary to the Board's previous recognition that an employer has a right to require employees to work during working time. *See Our Way, Inc.*, 268 N.L.R.B. 394, 394 (1983) ("Working time is for work' is a long-accepted maxim of labor relations."). In the instant case, the restrictions at issue were limited in their scope to activities on the work floor during work hours, and did not extend to hallways, break rooms, or other areas of Oberthur's facility. [Decision, p. 6]. This limitation extended no further than was minimally necessary to permit plant operations to continue unhindered. *See F.P. Adams Co. Inc.*, 166 N.L.R.B. 967 (1967) (reversing ALJ's finding that no solicitation rule violated Section 8(a)(1) where rule was limited to working time, was promulgated in the interest of serving production and order, and was not part of an ongoing pattern of unfair labor practices). Given the narrow scope of the restriction, as well as the fact that no employee was disciplined or threatened with discipline, there was insufficient evidence to support the ALJ's conclusion that Oberthur's conduct represented an unfair labor practice.

B. There Is No Basis in the Record for the Rescission Order Sought by the GC.

As part of its first Exception, the GC urges that ALJ erred in omitting a rescission remedy in connection with the Section 8(a)(1) violation involving the limitation on discussion of the Union. Preliminarily, in the event the Board sustains Oberthur's Exception to the finding of a violation, the GC's request for additional relief necessarily fails. Assuming *arguendo* that the finding of a Section 8(a)(1) violation is upheld, the rescission order sought by the GC is nonetheless inappropriate.

A further order directing rescission of the policy at issue is unnecessary because there was no testimony whatsoever at the hearing that Oberthur ever enforced a policy limiting discussion of the Union by disciplining any employee, or even threatening to discipline any employee. Moreover, Section 1(a) of the ALJ's Order already prohibits the promulgation or enforcement of any rule limiting discussion of the Union. [Decision, p. 13] The GC's request for further relief should therefore be denied.

C. There Is No Basis for the Additional Cease and Desist Provisions Sought by the GC.

The final issue raised by the GC in connection with Exception No. 1 centers on the phrasing of the ALJ's finding of a Section 8(a)(1) violation. The GC urges that because the ALJ couched his finding of a violation in terms of a restriction placed on speech "in the absence of a pre-existing valid no solicitation rule," the cease and desist language contained in the ALJ's order was not sufficiently broad. [GC Brief, p. 12]

As with the remainder of the GC's first Exception, the GC's argument rests on elevating form over substance. Assuming *arguendo* that the ALJ's finding of a violation is sustained, ¹ the

¹ As discussed supra, in the event that Oberthur's Exception No. 5 is sustained, the issue of an appropriate remedy becomes moot.

Order as currently written compels Oberthur to cease and desist from "[t]elling employees, in the absence of a valid no-solicitation rule, not to talk to each other about the Union or their union activities in work areas or during working time." [Decision, p. 13] Given that Oberthur does not have a general no-solicitation rule in place, the Order already provides the full relief sought by the GC via its first Exception.

GC Exception No. 2

A. The ALJ Incorrectly Described, But Later Properly Characterized, the Testimony of Sandra Smith, and Any Inapt Description of Her Testimony Was Irrelevant to the ALJ's Conclusions.

The GC correctly notes that although the ALJ referenced employee Sandra Smith as having testified that she "used a company copying machine in the press room to make copies of some union literature," Smith did not in fact admit to having made copies of Union literature. [Decision p.7] The basis for the ALJ's statement is unclear, but it appears to have been in the nature of a typographical error given that on the same page of his decision, the ALJ later stated that Smith "denied that she made the copies [of the Union literature]." [Id.]

The issue of whether Smith did or did not copy Union literature, however, is irrelevant to the ALJ's decision to dismiss the unfair labor practice charge surrounding Smith's conversation with supervisor Roman Young. The ALJ properly recognized that the "entire transaction is trivial and essentially non-coercive." [Decision, p. 8] Under Smith's own version of the conversation with Young, she had no intention of making copies of Union literature, even before she spoke with Young: "Yeah, I wouldn't do that." [Tr., p. 122] Smith testified that after Young told her that the company copier should not be used for copying the literature, he said that the company "would prefer you to hand out the flyers to, to people by hand." [Tr., p. 121] Smith then informed Young that she was permitted by law to leave literature on tables in the company

cafeteria, and the conversation ended. [*Id.*] It is undisputed that Smith was not disciplined, or threatened with discipline, and that the issue never came up again.

The ALJ's description of this incident as "trivial" and "non-coercive" is entirely apt, as is his comment during the hearing that: "This episode is not going to make it to Law and Order." [Tr., p. 436] The ALJ's recommendation that this unfair labor practice be dismissed should therefore be adopted.

B. The ALJ Properly Refused to Find an 8(a)(1) Violation In the Conversation Between Smith and Young.

The GC argues that the ALJ erred in not finding a violation of Section 8(a)(1) based on Young's comment to Smith that she should not be using Oberthur's copier to make copies of Union literature. The GC makes a bald assertion that Young's "sole concern" was his belief that Smith was engaging in Union activities. [GC Brief, p. 16] In so doing, the GC simply ignores Young's undisputed testimony explaining that the sole reason for the conversation was that Young had been informed that Smith was outside of her work area making copies while on the clock. [Tr., pp. 432-33] Smith herself testified that she had no intention of making any copies of Union material, even apart from the conversation with Young. [Tr., p. 122]

Moreover, the two cases cited by the GC regarding the use of company copiers are inapposite. In both *Gallup*, *Inc.*, 334 N.L.R.B. 366 (2001), and *Champion Intern. Corp.*, 303 N.L.R.B. 102 (1991) evidence was presented that employees routinely used the company copier machines and that use was restricted only in response to an organizing campaign. 334 N.L.R.B. at 369; 303 N.L.R.B. at 103. At no time in the five-day hearing in this matter did any employee testify to having ever used the Oberthur copiers for non-business matters. Assuming *arguendo* that Oberthur employees were previously allowed to make copies for their personal use, the ALJ's refusal to find a violation was nonetheless proper because Oberthur at no time introduced

a generally applicable policy selectively restricting use of the copy machine for organizing purposes. At most, a single supervisor told one employee that she was should not be using the copier for that purpose. The ALJ's refusal to find a violation on the grounds that this incident was "trivial" is entirely warranted.

The GC also argues that the ALJ should have found a violation of Section 8(a)(1) based on Young's comment to Smith that the company "preferred" that she hand out Union literature rather than leaving it on tables. The ALJ properly deemed this comment to be "non-coercive." [Decision, p. 8] As the ALJ noted, Smith readily acknowledged that Young did not tell her she could not leave literature on the cafeteria tables, only that he preferred she distribute the materials by hand. [*Id.*] Any suggestion of coercion in this communication is belied by the fact that, per Smith's own testimony, her response to Young's statement was to inform him that he was incorrect and that she had a legal right to leave the materials on the tables. [Tr., p. 121] The GC admits that Smith was never disciplined or otherwise threatened in connection with this incident, and there is no indication in the record that the matter was ever raised again. [GC Brief, p. 17] The ALJ's conclusion that the unfair labor practice charge should be dismissed was therefore proper, and the CG's Exception should be overruled.

GC Exception No. 3

In Exception No. 3, the GC argues that, in light of the ALJ's conclusion that Oberthur violated the Act by informing employees of the hold that was placed on the payment of wage increases and bonuses pending the election, the Order must be amended to explicitly prohibit Oberthur from telling employees that they "will not receive promotions, wage increases or spot bonuses because of the Union or because of the NLRB election." [GC Brief, p. 18 n.10]

The amendments to the Order and Notice sought by the GC are entirely superfluous. The Order already prohibits Oberthur from "[d]elaying the payment of scheduled wage increases and approved bonuses during the pendency of an NLRB conducted election." [Decision, p. 13] Further, the Notice includes a provision informing employees that Oberthur "WILL NOT delay payment of approved bonuses or scheduled wage increases" [Decision, p. 12 and Appendix] Reduced to its core, the GC's position is that Oberthur must be ordered not simply to refrain from engaging in certain conduct, but also ordered not to tell employees that it will engage in the very conduct from which it is expressly prohibited by the same instrument. The additional relief sought by the Board is redundant, and its Exception should be overruled.²

GC Exception No. 4

A. The GC's Argument that ALJ Erred in Failing to Order Make Whole Relief Relating to the Alleged Denial of Spot Bonuses Is Without Merit.

In its fourth Exception, the GC argues that the ALJ improperly declined to grant relief aimed at identifying and compensating employees who may have been denied spot bonuses during the period prior to the election in which Oberthur had placed a hold on the payment of bonuses and wage increases to bargaining unit employees. The ALJ properly refused the GC's request for such relief on the grounds that such relief would inherently be speculative in nature and de minimis in size.³

of the Act was erroneous.

² The foregoing argument assumes *arguendo* that the ALJ did not err in concluding that Oberthur violated the Act by instituting a hold on wage increases and bonuses pending the holding of the representation election and by informing its employees of that decision. As fully addressed in Oberthur's Exception Nos. 6 and 7, the ALJ's conclusion that Oberthur's conduct in this regard violated Section 8(a)(1) and (3)

³ Once again, the GC's Exception with regard to the relief directed by the ALJ is contingent on the Board sustaining the ALJ's finding that Oberthur's treatment of wage increases and bonuses in the period preceding the election was a violation of the Act. For the reasons set forth in Oberthur's Exception No. 6, the ALJ's finding of a violation was erroneous.

The GC's Exception centers on Oberthur's spot bonus program. Since 2007, Oberthur has had a policy of granting modest spot bonuses in recognition of exceptional work by its employees. [Tr., p. 165] As recognized by the ALJ, the granting of spot bonuses is ad hoc and event driven. [Decision, p. 13] The bonuses typically range from \$50 to \$150. [GC 3]

The GC argues that as a result of the hold that Oberthur placed on paying out wage increases and bonuses prior to the election, an unidentified number of employees were denied the opportunity to receive spot bonuses. This fundamental assumption underlying the GC's argument is incorrect, however, as the ALJ made an express finding that "the evidence shows that there were employees who were recommended for and or approved for spot bonuses after August 1, but where payment was delayed until after the election." [Decision, p. 8] Thus, contrary to the GC's contention, employees continued to be selected for spot bonuses during the period that the hold on wage increases and bonuses was in effect; payment of the bonuses was simply delayed until after the election. Because the premise underlying the GC's argument – namely that Oberthur ceased to consider employees for spot bonuses during the period leading up to the election – is incorrect, Exception 4 is without merit and should be dismissed.

Assuming *arguendo* that Oberthur had failed to consider employees for awards of spot bonuses during the one-month period between when the hold on wage payments and bonuses was instituted and the election was held, the relief sought by the GC is nevertheless inappropriate. In rejecting the GC's argument on this point, the ALJ explained that:

[I]t would be speculative for me to determine who, if anyone, might have had a spot bonus recommended and approved during

⁴ In light of the ALJ's finding, the GC's citation in its brief to *SNE Enterprises, Inc.*, 347 N.L.R.B. 472 (2006), is inapposite, as that case involved the actual discontinuance of wage reviews as opposed to a mere delay in the processing of payments. *SNE Enterprises* is also factually inapposite, in that the issue before the Board involved an employer's failure to conduct wage reviews which had been scheduled in accordance with established policies, as opposed to the payment of ad hoc bonuses which were not subject to any controlling standard.

the period of time in question. Moreover, since this policy ceased after little more than a month, the degree of prejudice to any given employee would not only be speculative but be slight.

[Decision, p 13]

The ALJ's reasoning on this point is sound. It is undisputed that the granting of spot bonuses was discretionary, and that such bonuses were only granted in recognition of extraordinary performance. Setting aside the fact that attempting to reexamine the spot bonus issue would require analysis of details concerning the performance of individual employees during a period more than six months ago, there is simply no standard by which to determine whether an individual employee's work would merit a spot bonus. The undisputed testimony at the hearing was that the granting of such bonuses was at the discretion of individual supervisors. [Tr. 166] As a result, the same type of performance that might lead to a bonus in one part of the plant might not result in an award for a different employee. In the absence of any identifiable standard for determining whether a bonus is appropriate, the review procedure sought by the GC would be entirely speculative.

The relief sought by the GC is also inappropriate in light of the minimal bonus amounts at issue. Assuming *arguendo* that certain employees were not considered for spot bonuses during the lead-up to the election – and again, the ALJ expressly found that Oberthur did continue to recommend employees for bonuses during this period – the period of time at issue was limited to the month immediately preceding the election. The GC thus seeks to initiate a lengthy, costly compliance proceeding focused entirely on identifying a potential handful of employees who may have been denied consideration for a discretionary bonus that would have amounted to \$50 to \$150. Indeed, after a five-day hearing and months-long investigation, the GC is able to identify only a single employee in its Brief whom it argues was denied

consideration for one potential spot bonus.⁵ [GC Brief, pp. 20-21] Given the marginal amounts which are potentially at issue, as well as the absence of a meaningful standard to be applied in evaluating decisions to grant or withhold a spot bonus, the ALJ properly denied the GC's request for further relief concerning spot bonuses.

B. The Additional Relief Requested by the GC Is Unwarranted In Light of the Fact that Oberthur Released Its "Hold" on Payment of Bonuses and Increases After the Election Was Held.

The GC argues that the ALJ's Order should be amended to include a provision directing Oberthur to rescind its "hold" on wage increases and spot bonuses. The requested relief is wholly superfluous, as the ALJ found that Oberthur discontinued the "hold" after the election was held. [Decision, p. 13] Indeed, the ALJ made express findings that wage increases and spot bonuses were paid out after the election was held, with applicable wage increases having been paid retroactively. [Decision, p. 12] Given that the "hold" is no longer in place, the GC's request that Oberthur be order to rescind the "hold" should be denied.

CONCLUSION

In light of the foregoing, Respondent Oberthur Technologies of America Corporation respectfully requests that the Board overrule the Exceptions of Counsel for the Acting General Counsel.

she is herself employed in the lamination and tacking group. [Tr., p. 302-03] The testimony elicited by the GC thus indicates that Thompson was simply performing her duties at the time of the incident for which she seeks a bonus; there was no testimony to indicate that the event was in any way out of the ordinary and therefore deserving of a bonus. The GC has identified no standard by which events such as that involving Thompson could be evaluated *post facto* to determine whether spot bonuses should be

issued.

⁵ The facts surrounding the GC's claim that Linda Thompson was improperly denied a spot bonus demonstrates the problems inherent to the relief sought by the Board. The GC suggests that Thompson should have received a bonus for noticing spots on a set of plastic sheets at Oberthur's facility (such spots would potentially render any product manufactured using the sheets defective). In so arguing, the GC ignores the ALJ's finding – consistent with all testimony at the hearing – that spot bonuses are paid, if at all, to employees who go beyond the normal call of duty in their performance. Thompson testified that

Dated: April 2, 2013.

WHITEFORD, TAYLOR & PRESTON, L.L.P.

Kevin C. McCormick

David M. Stevens

Attorneys for Respondent, Oberthur Technologies of America Corporation Seven Saint Paul Street Baltimore, Maryland 21202 (410) 347-8700 Telephone (410) 223-4379 Facsimile

2043608

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

OBERTHUR TECHNOLOGIES OF AMERICA CORPORATION

and

Cases: 04-CA-086325

04-CA-087233

04-RC-086261

GRAPHIC COMMUNICATIONS CONFERENCE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 14-M

PROOF OF SERVICE

I am counsel to Respondent Oberthur Technologies of America Corporation in the instant proceeding. I am over the age of eighteen years and not a party to the proceeding; my business address is Seven Saint Paul Street, Baltimore, Maryland 21202.

On April 2, 2013, I caused the following documents to be served:

Employer's Answering Brief to Acting General Counsel's Exceptions to the Decision of the Administrative Law Judge

by electronic mail to:

Randy M. Girer
Counsel for the Acting General Counsel
National Labor Relations Board
Region Four
615 Chestnut Street, 7th Floor
Philadelphia, Pennsylvania 19106-4413

and

Thomas H. Kohn, Esquire Markowitz & Richman 123 South Broad Street, Suite 2020 Philadelphia, Pennsylvania 19109

Counsel for the Union.

Executed on April 2, 2013.

I declare under penalty of perjury under the laws of the State of Maryland that the foregoing Proof of Service is true and correct.

Kevin C. McCormick

Attorneys for the Respondent:

Whiteford, Taylor & Preston, L.L.P. Seven Saint Paul Street Baltimore, Maryland 21202 (410) 347-8700 Telephone (410) 223-4379 Facsimile